No. 92-1659

In the Supreme Court of the United States

OCTOBER TERM, 1992

XYZ CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the work product doctrine gives corporate employees a right to refuse to testify about their knowledge of the costs incurred by their employer in performing a government contract, on the ground that the corporation's defense counsel had previously requested the employees to analyze those costs.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-15a, is reported at 979 F.2d 393. The opinion of the district court, Pet. App. 16a-33a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1992. A petition for rehearing was denied on January 15, 1993. The petition for a writ of certiorari was filed on April 14, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. XYZ Corporation (XYZ) designs and builds timing devices for navigating satellites. A grand jury in the Eastern District of New York is investigating allegations that XYZ and its president, Richard Roe, conspired to defraud the United States, in violation of 18 U.S.C. 286 and 371; committed major fraud against the United States, in violation of 18 U.S.C. 1031; and made false statements in a matter within the jurisdiction of a department or agency of the United States, in violation of 18 U.S.C. 1001. The government is investigating whether XYZ illegally inflated its costs on vouchers it submitted for work performed in connection with a series of subcontracts (the "Fox" contracts) between XYZ and a prime contractor producing sophisticated space equipment for the United States. Pet. App. 3a-4a.

After the execution of a search warrant at XYZ's premises in 1990, XYZ retained counsel to represent it in connection with the investigation. In January 1991, defense counsel requested that John Does #1 through #6—high-ranking employees of XYZ responsible for monitoring XYZ's costs—conduct an analysis of XYZ's costs related to the Fox contracts. In early 1992, all six employees appeared before the grand jury. During the course of their testimony, John Does #1, #3, #5, and #6 refused to answer questions with respect to the analyses they had made of the Fox contracts because the work had been done at the direction of XYZ's counsel. The witnesses read a statement setting forth their understanding that such information was protected from disclosure under the attorney-client privilege and the work product doctrine. Pet. App. 4a-5a.

On January 27, 1992, counsel for the John Doe witnesses advised XYZ's counsel that in pre-grand jury interviews the prosecutor had questioned the witnesses about their communications with XYZ's counsel. Defense counsel suggested to the prosecutor that the witnesses be shown documents of the government's choosing and be asked to analyze them without reference to the analysis the witnesses had previously conducted for the defense. The prosecutor rejected that suggestion, explaining that the proposed procedure would not elicit the witnesses' opinions regarding which documents would be relevant in determining the costs incurred under the Fox contracts. Pet. App. 5a.

2. On March 10, 1992, the government obtained an order requiring the witness to show cause why they should not be held in contempt for refusing to answer certain questions before the grand jury. The government provided counsel for the witnesses, XYZ, and Roe with a list of questions that the witnesses refused to answer, as well as additional questions that the government intended to ask the witnesses when they were recalled before the grand jury.[1] The questions are directed to determining the labor hours and costs incurred in connection with the Fox contracts. As part of that inquiry, the government sought to ask the witnesses what documents they would need to review and what questions they would need answered. The government made clear that it did not seek to obtain information pertaining to any communications with counsel or any documents produced

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[1] The questions are set forth in the appendix to the court of appeals' opinion. Pet. App. 13a-15a.

at the direction of counsel. Pet. App. 5a-6a; Gov't C.A. Br. 6-7.

After conducting an in camera review of the witnesses' analyses, the district court directed the witnesses to respond to the questions. The district court found that "the government is not seeking to obtain information regarding communications with [XYZ's] counsel or any documents that were produced by or at the direction of counsel." Pet. App. 30a. Rather, the court concluded that "the information sought is limited to the underlying facts and opinions regarding the 'Fox' contracts possessed by or within the knowledge of the [witnesses]." *Ibid.* The court concluded that the questions therefore "would not infringe upon the attorney-client or work product privileges as long as the questions are not connected to or identified with the analyses the [witnesses] conducted at the request of [XYZ's] counsel." *Ibid.* The court explained that "once a [witness] has testified to his estimates regarding the total labor hours and costs and the total costs incurred in connection with the 'Fox' contracts, [he] may be asked as to how he arrived at such estimates and as to how the estimates may be applied in this case," but "[t]he government * * * may not ask the [witness] whether any of this information was reported to [XYZ's] counsel." *Id.* at 30-31a.

3. The court of appeals affirmed with respect to 19 of the 23 questions at issue. Pet. App. 1a-12a. The court rejected petitioners' contention that the information in the employees' analyses is protected against disclosure to the grand jury by the attorney-client privilege or the work product doctrine, because counsel could not "silence all the key witnesses on the

cost aspects of the Fox contracts" simply by requesting them to conduct a cost analysis. *Id.* at 10a. If counsel could "succeed in such a tactic," the court explained, "the government would never be able to conduct a full and complete investigation of an alleged crime because the critical witnesses would have been effectively silenced." *Ibid.*

The court of appeals held that the majority of questions seek "underlying factual information," not communications to counsel, and that those underlying facts are "not protected by the attorney-client privilege just because the information was developed in anticipation of litigation." Pet. App. 11a. With respect to four questions (Questions #8, #9, #14, and #15), however, the court required "rephrasing * * * to avoid suggesting that the witness is being asked about any aspect of any communication he might have had with" defense counsel. *Ibid.*

The court of appeals also held, with respect to the work product doctrine, that the affidavits submitted by the witnesses undercut the assertion that the questions sought "judgments," "estimates," or "mental impressions" protected against disclosure as "attorney's work product." Pet. App. 11a. The court explained that "nowhere in the affidavits do appellants clarify what those judgments or mental impressions were—even in a very general manner." *Ibid.* The court added that, "[i]n fact, the attachments to the affidavits appear to be nothing but straightforward calculations from raw data, making it difficult to imagine what 'mental impressions' were involved." *Ibid.* Accordingly, the court of appeals affirmed the district court's order directing the witnesses to answer questions, as modified to avoid any

possible intrusion on communications with counsel. *Id.* at 12a.

ARGUMENT

Petitioners contend that the district court erred in directing the employee witnesses to answer the questions concerning the information reflected in the cost analyses. They argue that that information is protected from disclosure by the work product doctrine. Pet. 9-17. The courts below correctly rejected that claim, and it warrants no further review.

1. In *Hickman* v. *Taylor*, 329 U.S. 495, 510 (1947), the Court recognized a qualified immunity from discovery for the "files and the mental impressions of an attorney" prepared in anticipation of litigation. Under *Hickman*, the "work product of the lawyer" may be discovered only upon a sufficient showing of necessity.[2] *Id.* at 511-513. In reaching that conclusion, the Court expressed concern that "[w]ere such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten." *Id.* at 511. As a result, "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice in the preparation of cases for trial." *Ibid.* The Court made clear, however, that relevant, nonprivileged

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[2] The Court drew a distinction between written witness statements and the mental impressions of an attorney. The Court said that "written statements secured from witnesses" could be produced upon an adequate justification, 329 U.S. at 512, but it would be a "rare situation," *id.* at 513, if any exists, in which a party could justify production of "oral statements made by witnesses to [the adversary's attorney], whether presently in the form of his mental impressions or memoranda." *Id.* at 512.

facts obtained through the attorney's investigation are subject to discovery. *Id.* at 508-509, 513.

Since *Hickman*, the work product doctrine has been embodied in Fed. R. Civ P. 26(b)(3). That Rule provides that a party may obtain discovery of "documents and tangible things otherwise discoverable * * * and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative * * * only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." The Rule requires the district court, when ordering discovery of such materials on the requisite showing, to protect against disclosure of "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." The Court has held that the work product doctrine applies in criminal as well as civil cases. *United States* v. *Nobles*, 422 U.S. 225, 238 (1975).

As the Court recognized in *Hickman*, 329 U.S. at 504, 508-509, 513, there is a distinction between documents that a party has created and the facts contained in those documents. "[T]he courts have consistently held that the work product concept furnishes no shield against discovery * * * of the facts that the adverse party's lawyer has learned, or the persons from whom he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery." 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2023, at 194 (1970); 4 J. Moore, J.

Lucas & G. Grotheer, Jr., *Moore's Federal Practice* ¶26.64[1], at 26-287 (2d ed. 1993) ("Rule 26(b)(3) applies only to the production of documents and tangible things; underlying facts are freely discoverable."). See *In re Int'l Sys. & Controls Corp. Securities Litigation*, 693 F.2d 1235, 1240 (5th Cir. 1982); *Nutmeg Insurance Co.* v. *Atwell, Vogel & Sterling*, 120 F.R.D. 504, 509 (W.D. La. 1988); *Eoppolo* v. *National R.R. Passenger Corp.*, 108 F.R.D. 292, 294 (E.D. Pa. 1985); *Ford* v. *Philips Electronics Instruments Co.*, 82 F.R.D. 359, 360-361 (E.D. Pa. 1979). The Advisory Committee Notes to Fed. R. Civ. P. 26 explicitly state that the Rule makes "[n]o change * * * in the existing doctrine, noted in the *Hickman* case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable" under the work product doctrine. See J. Gergacz, *Attorney-Corporate Client Privilege* 7-15 (2d ed. 1990) ("Although work product removes certain items from discovery, the information contained in the work product is discoverable unless a separate claim of confidentiality can be raised.").

2. Petitioners argue that the work product doctrine entitles the employee witnesses to refuse to testify about their knowledge of the costs on the Fox contracts. That claim is incorrect. The government does not seek disclosure of any document or tangible item reflecting the employees' analyses. Rather, the evidence sought from the witnesses is precisely the type that is not protected under the work product doctrine—nondocumentary, factual information concerning the costs that were allocable to the Fox contracts and the manner in which those costs were determined from pre-existing documents. The work

product doctrine does not apply to such factual information.[3] Although the information was assembled in anticipation of litigation, its pre-existing factual content was in the possession of XYZ long before any litigation was anticipated. The information does not become protected simply because defense counsel requested that it be examined by employees.[4]

Petitioners argue (Pet. 16) that the government is limited to asking the employees what they knew before counsel asked them to conduct an inquiry, and that the government is barred from asking them anything about information they learned after that request was made. That is just a way of arguing that

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[3] As Professor Gergacz explains:

> Thus, a work product request that seeks to protect something other than a tangible item is inappropriate. One commentator suggested that work product is sometimes mistakenly raised as [if] it were a type of privilege; that is, as if the information itself is protected by the doctrine independent of the document that contains it. For example, during a deposition, a party may raise an objection concerning a certain line of questioning because it relates to protected work product. The objection is inappropriate. Work product does not extend that far.

J. Gergacz, *supra*, at 7-15 to 7-16 (footnote omitted).

[4] Petitioners cite (Pet. 15 n.14) numerous cases standing for the proposition that the work product doctrine protects documents and tangible items containing "fact" or "ordinary" work product as well as those containing "opinion" work product. We agree with that proposition, but it does not help petitioners. None of the cited cases contradicts the rule that one party may obtain discovery of facts known to an adverse party notwithstanding that the facts are contained in a protected document, and none of those cases conflicts with the court of appeals' decision in this case.

the corporation is entitled to shield facts from discovery by making those facts the subject of an internal investigation in anticipation of litigation. Here, the witnesses simply reconstructed in 1991 information that had been in XYZ's possession since 1988, when the company performed the Fox contracts. As the court of appeals recognized, Pet. App. 10a, defense counsel cannot convert information already possessed by his client into protected work product merely by directing the client to reconstruct the information and summarize it in a memorandum to the attorney.

If petitioners' approach were adopted, it would effectively deprive the government of accurate testimony concerning the costs associated with the Fox contracts. The employee witnesses cannot be expected to have detailed recollections of complex cost information three years after the events in question, and, even if they recalled it, they would have difficulty separating what they gleaned from their recent review of corporate records and what they knew beforehand. Thus, petitioners' approach would bar the grand jury from making inquiry of the only people likely to be familiar with the corporation's cost information. The breadth of petitioners' theory is illustrated by their claim that the government cannot even ask the witnesses "[w]hat documents would you need to review" and "[w]hat questions would you need answers to," to be able "to estimate the total labor and other costs incurred by XYZ in connection with the Fox contracts prior to termination." Pet. App. 14a-15a. Such a rule would frustrate the grand jury's purpose of determining whether crimes have

been committed in XYZ's performance of the Fox contracts.[5]

Petitioners' reliance (Pet. 17) on *Marine Petroleum Co.* v. *Champlin Petroleum Co.*, 641 F.2d 984 (D.C. Cir. 1979), is misplaced. That case involved the application of Fed. R. Civ. P. 26(b)(4)(B), which provides qualified protection for a nontestifying expert's knowledge and opinions developed in anticipation of litigation. The court of appeals required the expert to testify as to facts known and the opinions held prior to his engagement in connection with the litigation, but barred inquiry with respect to information developed by the expert thereafter. 641 F.2d at 994. The court made clear, however, that the *party* would be required to produce in discovery any relevant facts that it had learned from the expert. *Ibid.* And there was no suggestion in *Marine Petroleum* that the information acquired by the expert in preparation for litigation was in the party's possession before litigation was anticipated.

Finally, petitioners contend (Pet. 19-20) that requiring the witnesses to answer the government's questions would undermine or, perhaps, violate XYZ's

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[5] Petitioners err in arguing (Pet. 16 n.15) that the cost analyses do not contain "pre-existing facts," but contain only facts "generated" by the investigation requested by counsel. As the court of appeals explained after reviewing the materials submitted to the district court for in camera examination, the witnesses' cost determinations amounted to "nothing but straight-forward calculations" from the pre-existing "raw data." Such a review of corporate cost documents does not produce new "facts." And, to the extent that petitioners argue in passing (Pet. 15 n.13) that the employees' conclusions qualified for heightened protection as "mental impressions," the court of appeals squarely rejected that claim. Pet. App. 11a.

attorney-client privilege, because the answers would disclose the substance of communications made by XYZ's employees to counsel. That is incorrect. The protection of the attorney-client privilege

> extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated [it] into his communication to his attorney.

Upjohn Co. v. *United States*, 449 U.S. 383, 395-396 (1981), quoting *Philadelphia* v. *Westinghouse Electric Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962). The court of appeals carefully limited the inquiries permitted in this case to "avoid suggesting that the witness is being asked about any aspect of any communication he might have had with the lawyer." Pet. App. 11a.

Here, the government does not seek to learn what the witnesses told counsel; rather, it seeks to obtain from the witnesses facts within their knowledge that they may also have disclosed to counsel. If the disclosure of such facts in this case would indirectly reveal to the government the substance of attorney-client communications, that is only because, in asserting claims of privilege, the witnesses volunteered that their analyses had been performed for and provided to counsel. A witness may not bootstrap a claim of attorney-client privilege by voluntarily revealing that the facts sought by the government had been incorporated into communications with his lawyer.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60298